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 EDWARD C. REED and BARBARA P. REED

UNITED STATES DISTRICT COURT**DISTRICT OF NEVADA**

* * * *

| | | |
|-----------------------------------|---|----------------------------|
| TAE-SI KIM, an individual, and |) | CASE NO. 2:09-CV-2008 |
| JIN-SUNG HONG, an individual, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | |
| |) | |
| ADAM B. KEARNEY, an individual; |) | DEFENDANTS RE/MAX EXTREME, |
| EDWARD C. REED, an individual; |) | EDWARD C. REED AND BARBARA |
| BARBARA R. REED, an individual; |) | P. REED'S REPLY TO |
| REED TEAM, dba RE/MAX EXTREME, a |) | PLAINTIFFS' RESPONSE TO |
| Nevada general partnership; FIRST |) | MOTION TO DISMISS |
| AMERICAN TITLE, a foreign |) | |
| corporation; GINA THOMPSON, an |) | |
| individual; ALVERSON, TAYLOR, |) | |
| MORTENSEN & SANDERS, a Nevada law |) | |
| firm; and, the Estate of JAMES L. |) | |
| ZEMELMAN, ESQ. |) | |
| |) | |
| Defendants. |) | |

COME NOW, Defendants RE/MAX EXTREME, EDWARD C. REED and
 BARBARA P. REED, by and through their attorneys, OLSON, CANNON,
 GORMLEY & DESRUISSEAUX, and hereby and hereby file this Reply to
 Plaintiffs' Response to Motion to Dismiss.

. . .

1 This reply is made and based on the attached points and
2 authorities, all papers and pleadings on file herein, and such
3 oral argument as the court may entertain at the hearing of the
4 motion.

5 DATED this 11th day of January, 2010.

6 OLSON, CANNON, GORMLEY &
7 DESRUISSEAUX

8 By /s/ Michael E. Stoberski
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18 POINTS AND AUTHORITIES

19 I.

20 INTRODUCTION

21 Tae-Si Kim ("Kim") and Jin-Sung Hong ("Hong") (collectively
22 "Plaintiffs") filed their Complaint on October 15, 2009, against
23 Edward C. Reed ("Mr. Reed"), Barbara R. Reed ("Mrs. Reed"), Reeds
24 and RE/MAX Extreme ("RE/MAX Extreme") (collectively "RE/MAX
25 Extreme Defendants"). On December 14, 2009, the RE/MAX Extreme
26 Defendants filed their motion to dismiss three of Plaintiffs'
27 thirty-two causes of action. Specifically, the RE/MAX Extreme
28 Defendants moved to dismiss Plaintiff's causes of action for
breach of fiduciary duty, breach of contract, and breach of the

1 covenant of good faith and fair dealing. On December 31, 2009,
2 Plaintiffs filed their Response to the Motion to Dismiss
3 ("Response").

4 II.

5 ARGUMENT

6 In the Response, Plaintiffs noted that the RE/MAX Extreme
7 Defendants did not cite to any case law to support the assertion
8 that the RE/MAX Extreme Defendants are not subject to common law
9 fiduciary duties when acting as a real estate licensee in a
10 transaction. (Response, 4: 10-11.) That statement is misleading
11 in that there is no reported case law on NRS Chapter 645 from the
12 Nevada Supreme Court.¹

13 With respect to the breach of contract claim, in the
14 Response, Plaintiffs argue that in order for a breach of contract
15 claim to survive a motion to dismiss pursuant to Rule 12(b)(6),
16 the Plaintiff only has to show that the parties intended to
17 create direct legal obligations between themselves. (Response,
18 5: 6-9.) In support of that position, Plaintiffs cited to the
19 unpublished opinion of *AT&T Corporation v. MRO Communications,*
20 *Inc.*, 1999 WL 1178965, 5 (9th Cir. 1999). In that case, the
21 Court did state that a manifestation of an intent to contract is
22 essential, though it does not state that showing such an intent
23 is all that is necessary to plead a contract. See *id.* The
24 Court stated that to withstand the motion to dismiss, the party
25 had to allege facts necessary to establish contract formation.

26 . . .

27
28 ¹ There are unpublished opinions of the Nevada Supreme Court
referring to NRS 645.251 and NRS 645.252.

1 See *id.* (citing *Snyder v. Viani*, 885 P.2d 610, 613).² In *MRO*
2 *Communications*, the party failed to allege facts necessary to
3 establish contract formation, so the claim was properly
4 dismissed. *Id.* Consequently, that court would not have had to
5 reach the question of whether additional facts to establish other
6 elements of a breach of contract claim would have to have been
7 pled.

8 Regardless, Plaintiffs discussed four grounds that they
9 argue show an intent for the RE/MAX Extreme Defendants to be
10 contractually obligated to Plaintiffs. Notwithstanding that
11 Plaintiffs have to allege additional facts as noted in the Motion
12 to Dismiss, the four grounds discussed by Plaintiffs are not
13 sufficient to prevent dismissal pursuant to 12(b)(6) under the
14 standard set forth in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949
15 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570,
16 127 S.Ct. 1955 (2007)).

17 As this Court is aware, under *Ashcroft*, the Court is not
18 bound to accept legal conclusions as true. *Id.* at 1949-50
19 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). The Court
20 assumes the truth of factual allegations, not legal conclusions,
21 and then determines whether they plausibly give rise to an
22 entitlement to relief. *Id.* at 1950. For a claim to be
23 plausible, the plaintiff must plead "factual content that allows
24 the court to draw the reasonable inference that the defendant is

25
26
27 ² It should be noted that the Court cited with approval to
28 *Snyder*, which the Plaintiffs discuss in their Response. Of
course, the factual situation in *Snyder* is different; however,
the rule that *Snyder* set forth – that a Plaintiff must allege
facts necessary to establish formation of a contract – is valid.

1 liable for the misconduct alleged." *Id.* (citing *Twombly*, 550
2 U.S. at 556, 127 S.Ct. 1955).

3 In this case, Plaintiffs alleged that the Reeds and Adam
4 Kearney ("Keerney") were a joint venture or partnership. In
5 Plaintiffs' Response, they contend that because they alleged that
6 the Reeds and Kearney were a joint venture or partnership, the
7 RE/MAX Extreme Defendants should be held liable for breach of
8 contract for any contracts entered into by Kearney, including the
9 Option Contract. (See Response, 7-8.) The assertion of the
10 existence of a joint venture or partnership is a legal
11 conclusion, which should not be accepted as true pursuant to the
12 standard in *Ashcroft*. Consequently, that assertion should not
13 serve as a basis to prevent dismissal of the breach of contract
14 claim; rather, Plaintiffs should still have to show that the
15 facts relating to the RE/MAX Extreme Defendants plausibly give
16 rise to a claim for breach of contract, which which they cannot
17 show here.

18 Plaintiffs contend that they have pled that the RE/MAX
19 Extreme Defendants intended to be contractually obligated
20 pursuant to the Option Agreement, yet Plaintiffs themselves
21 acknowledged in their Complaint that the RE/MAX Extreme
22 Defendants were not parties to the Option Agreement. (Response,
23 6-7; Complaint, §29.) In the Response, Plaintiffs contend that
24 allegations that the RE/MAX Extreme Defendants would ensure that
25 clear and marketable title be transferred showed an intent to
26 contract, which would independently bind them. (Response, 6: 14-
27 28.) However, Plaintiffs did not ever assert or allege anything
28 that could be construed as consideration relating to the alleged

1 statement to ensure the transfer of clear, marketable title.
2 Moreover, Plaintiffs did not allege that the RE/MAX Extreme
3 Defendants were obligated to do anything under the terms of the
4 Option Agreement itself, let alone allege that the RE/MAX Extreme
5 Defendants breached such non-pled terms. Consequently,
6 Plaintiffs' claim for breach of contract based upon an alleged
7 breach of the Option Agreement is not plausible on its face, and
8 should therefore be dismissed.

9 In Plaintiffs' Response, Plaintiffs try to expand the scope
10 of the allegations in the Complaint to assert that they alleged a
11 breach of the "Assignment." (Response, 6: 12-22.) Plaintiffs
12 attached the "Assignment" to their Complaint as Exhibit 6, which
13 is titled "RE/MAX Extreme Addendum to Contract." It is an
14 addendum to the Offer and Acceptance dated June 24, 2005 between
15 Plaintiff Jin Sung Hong as purchaser and the sellers that
16 replaces Kearney as the purchaser. Given that this Assignment
17 was simply an addendum to a purchase contract, it is unclear
18 whether Plaintiffs are arguing in their response that the
19 Assignment itself was a contract. If they are alleging that it
20 was a contract itself, there is no allegation in the Complaint of
21 what terms, if any, of the addendum were breached by the RE/MAX
22 Extreme Defendants. In fact, there are no allegations that the
23 RE/MAX Extreme Defendants had any obligations under the terms
24 contained in the addendum itself. If Plaintiffs are alleging
25 that the Assignment was not the contract, but rather that the
26 oral promise that Kearney would acquire the property for the
27 Plaintiffs constituted the contract, then Plaintiffs have again
28 failed to allege any consideration for such promise that may even

1 potentially give rise to the existence of such a contract.
2 Consequently, to the extent that Plaintiffs' claim for breach of
3 contract is based upon an alleged breach of the Assignment,
4 Plaintiffs' claim is not plausible on its face, and it should
5 therefore be dismissed.

6 Similarly, Plaintiffs' claim in their Response that there
7 was an overarching contract to obtain the property with clear,
8 marketable title is not plausible on its face after an analysis
9 of Plaintiffs' Complaint. Plaintiffs argue that based on their
10 allegation that Kearney and the RE/MAX Extreme Defendants failed
11 to pay off the lien and failed to deliver clear and marketable
12 title, and based on the allegation that Plaintiffs satisfied
13 Plaintiffs' obligations under an Assignment, Note, and RE/MAX
14 Option Agreement, that they had somehow alleged an overarching
15 intent to become contractually obligated. (Response, 8-9.) Even
16 when viewed in the light most favorable to Plaintiffs, those
17 allegations do not lead to the conclusion that a contract existed
18 between the RE/MAX Extreme Defendants. Instead, those
19 allegations imply that the Plaintiffs had agreed to an
20 Assignment, a Note, and an Option Agreement, and that they did
21 not receive clear and marketable title. The contention in
22 Plaintiffs' Response that there was an overarching contract is
23 not supported by the allegations in the Complaint, and it is not
24 plausible on its face. Consequently, Plaintiffs' cause of action
25 for breach of contract should be dismissed pursuant to 12(b)(6).

26 With respect to Plaintiffs' claim for breach of the covenant
27 of good faith and fair dealing, Plaintiffs appear to argue in
28 their Response that the contract underlying the claim was based

1 on a promise to secure marketable title in exchange for a
2 promised commission.³ (Response, 11: 1-4.) Plaintiffs cited to
3 Complaint paragraphs 31 and 278-279 in support of that position,
4 yet none of those paragraphs contain any allegation that the
5 Plaintiffs promised a commission in exchange for a promise to
6 obtain such title.⁴ Given that, Plaintiffs have still failed to
7 allege an underlying contract that could serve as the basis for a
8 claim for breach of the covenant of good faith and fair dealing.

9 Plaintiffs argue that they do not even have to allege the
10 *breach* of a contract to maintain a claim for breach of the
11 covenant of good faith and fair dealing. That argument misses
12 the point. It may not be necessary to allege an act that
13 constitutes an actual breach of the contract; however, for a
14 plaintiff to be entitled to relief for breach of the covenant of
15 good faith and fair dealing, there must be a contract that gives
16

17 ³ It should be noted that the Complaint only explicitly refers
18 to the Option Agreement in the section on breach of the covenant
19 of good faith and fair dealing, which as discussed in the Motion
20 to Dismiss, the RE/MAX Extreme Defendants were not a party to.
21 Consequently, the Option Agreement cannot serve as the basis for
22 their claim for breach of the covenant of good faith and fair
23 dealing.

24 ⁴ Typically, commissions are not paid for by the buyer of a
25 property; rather, they are paid by the seller pursuant to the
26 seller's arrangement with the listing broker. When commissions
27 are paid by the buyer, they are generally paid pursuant to a
28 written buyer's brokers agreement that specifies the specific
percentage to be paid and that obligates both parties.
Plaintiffs have not alleged the existence of such a buyer's
brokerage agreement here. Given that, simply alleging that
Plaintiffs received a commission does not imply that the
commission was consideration for a contract. Consequently,
Plaintiffs' assertion is incorrect that it "in order to be
entitled to receive those commissions, the Reed Defendants were
contractually obligated to perform for Plaintiffs." (Response,
9: 14-17.)

1 rise to the covenant of good faith and fair dealing in the first
2 place. See *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*,
3 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) (the duty of good
4 faith and fair dealing arises between the *contracting parties* to
5 a contract). Since Plaintiffs have failed to plead the
6 existence of a contract between the RE/MAX Extreme Defendants and
7 Plaintiffs, Plaintiffs have failed to plead a claim for breach of
8 the covenant of good faith and fair dealing that is plausible on
9 its face. Consequently, dismissal of the claim for breach of the
10 covenant of good faith and fair dealing is appropriate.

11 It should be noted that Plaintiffs argue that the RE/MAX
12 Extreme Defendants are inviting the Court to construe the
13 pleadings so narrowly as to be "utterly unreasonable."
14 (Response, 11: 17-19.) The RE/MAX Extreme Defendants are not
15 requesting the pleadings to be construed so narrowly; rather, the
16 RE/MAX Extreme Defendants are requesting that the Court review
17 the factual allegations of the Complaint to determine whether the
18 particular causes of action at issue plausibly give rise to an
19 entitlement to relief on those claims as required by *Ashcroft v.*
20 *Iqbal*, 129 S.Ct. 1937, 1949 (2009). A review of the factual,
21 non-legal allegations in the Complaint, shows that the claims for
22 breach of fiduciary duty, breach of contract, and breach of the
23 covenant of good faith and fair dealing are not plausible, and
24 should be dismissed pursuant to Rule 12(b)(6).

25 III.

26 CONCLUSION

27 Dismissal of Plaintiffs' Twenty-Third Cause of Action for
28 Breach of Fiduciary Duties for failure to state a claim upon

1 which relief may be granted is appropriate because licensees are
2 not required to comply with common law fiduciary duties; instead,
3 they are subject to the duties set forth in NRS Chapter 645.
4 Dismissal of Plaintiffs' Twenty-Sixth Cause of Action for Breach
5 of Contract is also appropriate because Plaintiffs have failed to
6 a plead facts sufficient to support a claim for breach of
7 contract that is plausible on its face. Dismissal of Plaintiffs'
8 Twenty-Seventh Cause of Action for Breach of the Duty of Good
9 Faith and Fair Dealing is appropriate because Plaintiffs have not
10 alleged the existence of a contract that could give to the
11 covenant. Consequently, the RE/MAX Extreme Defendants
12 respectfully request that Plaintiffs' Twenty-Third Cause of
13 Action for Breach of Fiduciary Duties, Plaintiffs' Twenty-Sixth
14 Cause of Action for Breach of Contract, and Plaintiffs' Twenty-
15 Seventh Cause of Action for Breach of the Duty of Good Faith and
16 Fair Dealing be dismissed pursuant to Rule 12(b)(6).

17 DATED this 11th day of January, 2010.

18 OLSON, CANNON, GORMLEY &
19 DESRUISSEAU

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CERTIFICATE OF SERVICE VIA EFP PROGRAM

I hereby certify that on this 11th day of January, 2010, I did serve, via the Court's CM/ECF System, a copy of the above and foregoing DEFENDANTS RE/MAX EXTREME, EDWARD C. REED AND BARBARA P. REED'S REPLY TO RESPONSE MOTION TO DISMISS PLAINTIFFS' COMPLAINT:

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